PROCORP REALTY SDN BHD

v.

SUMPILES (MALAYSIA) SDN BHD

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CIVIL SUIT NO: 22-134-2000]
18 SEPTEMBER 2001

CONTRACT: *Building contract - Construction of terms - Claim for work done by sub-contractor - Condition precedent - Sub-contractor entitled to payment upon main contractor being paid - Claim for payment before main contractor being paid - Whether premature*

CIVIL PROCEDURE: *Summary judgment - Building contract - Claim for work done by sub-contractor - Condition precedent - Sub-contractor entitled to payment upon main contractor being paid - Claim for payment before main contractor being paid - Whether premature - Whether there were triable issues*

The plaintiffs had entered into a building contract with the defendants ('the sub-contract') and agreed to undertake certain construction works in respect of the development of the so-called Ipoh Parade Phase 2 ('the project'). By cl. 20 of the sub-contract read with para. 5 of the schedule thereto, the defendants agreed to pay the plaintiffs for the work done: (i) when the sum due and payable was paid to the defendants by the client, the owner of the project ('the client'); (ii) within 14 days after the defendants had received the payment in question from the client.

The plaintiffs had completed the construction works and had been paid RM2,376,964.67 by the defendants. However, a sum of RM254,294.32 remained unpaid, as such payment was yet to be certified by the client and the defendants, therefore, had still not received the payment. This apart, the defendants had also incurred additional costs on various remedial works, and were contemplating to set off the costs against the said sum of RM254,294.32. The plaintiffs nonetheless alleged that they were entitled to the payment of the outstanding sum, as the parties had signed the Statement of Final Account in respect of the works. The plaintiffs in the circumstances filed a writ action against the defendants claiming the sum of RM254,249.32, and following that, applied for summary judgment of the same. The application for summary judgment was however dismissed by the learned registrar, whereupon the plaintiffs appealed.

Held:

[1] Clause 20 of the sub-contract and para. 5 of the schedule thereto were clearly arguable points and were unfavourable to the plaintiffs. By these clauses there was a contractual duty on the part of the defendants to pay the plaintiffs within 14 days after the defendants had received payment from the client but not before that event had occurred. Since the defendants were yet to be paid by the client, the plaintiffs' claim was quite premature. (p 618 f)

[2] The onus is on the plaintiffs to prove that the defendants were under a contractual duty to commence civil proceedings against the client to recover payment under the main contract to enable them to make payment to the plaintiffs of the balance due. On the evidence, the plaintiffs had not shown that this was so. Clearly, in view of the conflicting affidavits, the assertion required further investigation at the trial. (p 618 h)

[3] On the issue of estoppel, the onus is likewise on the plaintiffs to prove that estoppel applies in order to prevent the defendants from relying on both cl. 20 and para. 5 of the schedule to the sub-contract. This the plaintiffs had failed to do. (p 619 a-b)

[Appeal dismissed.]

Case(s) referred to:

Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473 ***(refd)***

Boustead Trading [1985] Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***

Brightsude Necgabucak & Electrical Services Grp Ltd v. Hyundai Engineering & Construction Ltd [1988] 41 BLR 110 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14

For the plaintiff - CS Loong; T/n San & Loong
For the defendant - Penny Khoo; T/n Penney Khoo Soh Ping & Co

Reported by WA Sharif

JUDGMENT

Su Geok Yiam JC:

This is an appeal to the judge in chambers (encl. 14) by the plaintiffs against the decision of the learned deputy registrar dated 21 February 2001 dismissing with costs the plaintiff's application for summary judgment *vide* summons in chambers dated 3 August 2000 (encl. 6) for a sum of RM254,249.32.

The Plaintiffs' Case

On 30 May 2000, the plaintiffs filed a writ action against the defendants claiming the sum of RM254,249.32. The plaintiffs' claim against the defendants arose out of a written agreement dated 10 May 1996 entered into between the plaintiffs and the defendants (exh. "YCS1", defendants' affidavit-in-reply affirmed on 28 May 2000 and filed on 30 August 2000, hereinafter referred to as "the sub-contract"). The plaintiffs are the sub-contractor whilst the defendants are the main contractor. The defendants have entered into a contract (hereinafter referred to as "the main contract") with the client. The works to be undertaken by the plaintiffs under the sub-contract are earth work excavation, pilecap, basement slab, retaining wall and associated mechanical and electrical works (hereinafter referred to as "the said works").

The plaintiffs have completed the said works and have been paid a sum of RM2,376,964.67 as progressive payment. What remains to be paid is the sum of RM254,294.32 which the plaintiffs claim is the balance due and payable under the sub-contract and which has been agreed upon by the defendants pursuant to a statement of final accounts dated 16 July 1999 signed by both parties (exh. "LAK1", affidavit-in-reply of Leong Ah Kow @ Leang Lean Yow (encl. 7)) with interest and costs.

It is an implied term of the sub-contract that the defendants would take all the necessary steps to ensure that they are paid by the client so that the plaintiffs can be paid pursuant to cl. 20 of the sub-contract and para. 5 of the schedule to the sub-contract. If it were otherwise the defendants and the client could conspire to cheat the defendants. The defendants had, through its workers or agents, made representations to the plaintiffs before the statement of final account was agreed upon that payment would be made immediately after the resolution of the late completion of the project and the defects in the said works. It was because of those representation that the defendants had agreed to all the deductions as set out in the statement of final accounts. Therefore, the defendants are estopped from relying on cl. 20 of the sub-contract and para. 5 of the schedule in order to defeat the plaintiffs' claim.

The Defendants' Case

Although the said works have been completed by the plaintiffs on 25 July 1995 there was a delay of 105 days because the contractual date for completion is 11 April 1997.

There were also many defects in the said works. The defendants had incurred additional costs in the procurement of remedial works. As a result the defendants dispute the correctness of the statement of final account because the defendants are entitled to set off these costs against the sum of RM254,294.38.

More importantly, the plaintiffs' claim is premature because the plaintiffs are only entitled to payment if two conditions are met.

The first condition requires certification by the SO or the client's representative of the balance due and payable by the defendants. The reason is because the defendants have entered into the main contract with the client who is the owner of the project for the execution and completion of substructure works to the proposed mixed development (Ipoh Parade Phase 2) on lot 10488, 11129, 11116, 33516, 33518, 2902 and 2903, Jalan Abdul Jalil/Sultan Idris Shah, Ipoh, Perak Darul Ridzuan.

The second condition requires payment to be made by the client to the defendants. Once these two requirements are satisfied the balance so certified becomes due and payable and the defendants are under a contractual obligation to make payment to the plaintiffs within 14 days.

These two conditions can be found in cl. 20 of the sub-contract.

Since the defendants are disputing the statement of final account and the defendants have not been paid by the client despite efforts made in the form of phone calls, letters of demand and reminders (encl. "YSC2", affidavit-in-reply of Yeoh Sik Ching (encl. 8) to the client to chase for payment, the plaintiffs' claim is without basis).

The defendants deny that there is an implied term in the sub-contract that obligated the defendants to take the necessary steps to ensure payment by the client including the institution of civil proceedings.

The defendants also deny that they had made representations to the plaintiffs in order to induce the plaintiffs to agree to the statement of final account. Consequently, the defendants contend that the issue of estoppel is in actual fact a non-issue.

Decision Of The Learned Deputy Registrar

The learned deputy registrar in dismissing the plaintiffs' application for summary judgment with costs ruled as follows:

> Satu Penghakiman terus hanya boleh diberikan dalam kes-kes yang jelas dan nyata sahaja. Otoriti bagi prinsip ini telah dinyatakan dalam banyak kes yang diputus terdahulu dan tidak perlu saya ulangi disini.
>
> Adalah menjadi fakta yang tidak dipertikaikan bahawa pembayaran adalah secara back to back payment seperti yang jelas dinyatakan dalam Klausa 20 dibaca bersama dengan jadual para 5.

Dengan ini saya berpendapat bahawa defendan akan bertanggungan untuk membayar sekiranya dapat dibuktikan bahawa defendan telah menerima pembayaran dari Pemunya Projek dan tanpa sebarang alasan defendan telah gagal membayar hutang plaintif.

Malangnya saya dapati plaintif telah gagal berbuat demikian sebaliknya menyatakan adalah menjadi terma tersirat bahawa defendan perlu berusaha mendapatkan pembayaran dari Pemunya Projek dan plaintif tidak sepatutnya dinafikan haknya tanpa penghujung semata-mata kerana defendan belum menerima bayarannya. Adalah menjadi keputusan saya bahawa dengan hujahan peguam plaintif ini sahaja mencukupi untuk menunjukkan adanya isu untuk dibicarakan. Sama ada Klausa 20 ini mempunyai terma tersirat hanya boleh ditentukan melalui keterangan saksi dalam perbicaraan penuh. Isu ini tidak sesuai diselesaikan secara affidavit. Kes *Sababumi (Sandakan)* yang dirujuk oleh plaintif menunjukkan bahawa Mahkamah hanya memutuskan keujudan terma tersirat melalui keterangan saksi. Kesimpulannya saya mendapati bahawa terdapatnya isu yang perlu dibicarakan dalam soal masa pembayaran terutamanya atas alegasi terma tersirat yang terkandung dalam perjanjian antara plaintif dan defendan.

Appeal To The Judge In Chambers

In the appeal before me the plaintiffs relied on two issues. These are as follows:

(1) clause 20 of the sub-contract as interpreted in the New Zealand case of *Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 is not a limitation on the right of the plaintiffs to be paid. Clause 20 only imposes a time for payment to be made. The clause does not bar nor limit the plaintiffs' right to claim against the defendants.

(2) having made representations to the plaintiffs and having agreed to the statement of final account the defendants are estopped from denying that the payment does not have to be made immediately. Reliance is placed on the case of *Boustead Trading [1985] Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

In response, Penny Koo, the defendants' counsel has submitted that there are two triable issues. The first triable issue is what is the true construction of cl. 20 of the sub-contract and para. 5 of the schedule to the sub-contract. She contends that the duty on the part of the plaintiffs to pay the defendants arises only after the two conditions precedent have been met, ie, the certification of the amount due by the SO and payment to the defendants by the client. She maintained that the defendants are not obligated to sue the client since there is no implied term to that effect in the sub-contract. She relied on the case of *Brightsude Necgabucak & Electrical Services Grp Ltd v. Hyundai Engineering & Construction Ltd* [1988] 41 BLR 110.

The second triable issue is that estoppel does not arise at all because the plaintiffs have not shown proof of an oral agreement on the part of the defendants to pay the plaintiffs based on the statement of final account instead of in accordance with cl. 20 of the sub-contract and para. 5 of the schedule to the sub-contract.

Findings Of The Court

In order to succeed on a summary judgment application under O. 14 of the Rules of the High Court 1980 the plaintiffs must be able to establish a *prima facie* claim and to satisfy the court that the defendants have no arguable defence. In order to defeat the plaintiffs' application for summary judgment the defendants must satisfy the court that they have a good arguable defence or that there is a triable issue of fact which merits further investigation at the trial and/or an issue of law the determination of which would require the court to scrutinise and construe lengthy documents and to consider difficult points of law. Having considered the lengthy submissions of both the learned counsels, I am satisfied that the plaintiffs have failed in establishing a *prima facie* case for the amount claimed and that the defendants have demonstrated two arguable defences.

My reasons are as follows:

(1) On the first alleged triable issue which concerns the interpretation of cl. 20 of the sub-contract and para. 5 of the schedule to the sub-contract, I am of the view that the two provisions do not favour the plaintiffs because they would appear to provide that payment would only be made to the plaintiffs by the defendants if the defendants have been paid by the client. The defendants have 14 days to effect such payment failing which the plaintiffs would appear to have a valid cause of action against the defendants. It is also apparent from the last recital in the sub-contract that the said works "form part of the works to be executed" by the defendants under the main contract. In my considered view, as the two provisions stand, the plaintiffs' claim would appear to be premature.

(2) The onus is on the plaintiffs to prove their assertion that there is an implied term in the sub-contract that the defendants are under a contractual duty to commence civil proceedings against the client to recover payment under the main contract to enable them to make payment to the plaintiffs of the balance due under the sub-contract. As the affidavit evidence stands the plaintiffs have failed to conclusively show that this is so. In view of the conflicting affidavits the court is of the view that this assertion requires further investigation at the trial.

(3) On the issue of estoppel which was raised by the plaintiffs founded on representations allegedly made by the defendants to the plaintiffs purportedly to induce the plaintiffs to agree to the statement of final account in order to enable the defendants to effect payment to the plaintiffs upon the agreement by the plaintiffs although the figures set out therein were prejudicial to the plaintiffs, again the onus is on the plaintiffs to prove that estoppel applies in order to prevent the defendants from relying on both cl. 20 and para. 5. (See the *Boustead Trading [1985] Sdn Bhd* case (*supra*).

(4) Having considered the New Zealand case of *Smith & Smith Glass Ltd* (*supra*) I am of the respectful view that the decision in *Brightside Mechanical & Electrical Services Group Ltd* (*supra*) is to be preferred.

My reasons are as follows:

(a) In *Smith & Smith Glass Ltd* (*supra*) both the plaintiffs and defendants (WACS Ltd) were sub-contractors. Upon completion of the works under the second sub-contract, the plaintiffs sued the defendants for payment. Unlike the facts in the instant case, there was no dispute as to the quality of the plaintiffs' work nor as to the value. The second defence raised by the defendants (which the learned judge referred to as the "pay when paid" defence) was that the effect of the terms of the sub-contract between the plaintiffs and the defendants was that it would be liable to pay the plaintiffs only when it had itself been paid by the main contractor, ie, Angus Construction (Auckland) Ltd. (Angus) which event had not occurred. The plaintiffs, however, argued that the terms of payment under the sub-contract related only to the time when payment was to be made to them and that they were not conditions as to whether payment was to be made at all.

(b) The owner of the project, Chase Corporation Ltd, had been placed in statutory management and the main contractor, Angus, was put into receivership prompting the learned judge, Master Towle, in granting summary judgment to the plaintiffs for the amount of $105,770.25 plus ongoing interest to hold as follows under headnote "Held: 2":

> Although it was possible for contracting parties to include in their agreement clear and unambiguous conditions which had to be fulfilled before a subcontractor had the right to be paid, any such condition would be construed strictly against the party inserting it because it would effectively mean that the subcontractor accepted the financial viability of the entire project and might be required to make a financial assessment of all parties higher up the contractual chain. Unless the contracting parties made it clear beyond doubt that there was a condition precedent before liability to pay at all arose (an "if" clause) was opposed to a clause limiting the time for payment (a

"when" clause), then it would not be upheld. It was not reasonably arguable that the relevant clauses in this case were in the "if" category; they were clearly in the "when" category and Smith & Smith was accordingly entitled to be paid even though WAGS Ltd had not itself been paid by Angus.

(c) The wording of the two provisions which the learned judge had to consider before arriving at his conclusion an set out above, ie, clauses 17 and 18 would appear to be different from the wording of the two provisions in the instant case. These two clauses are reproduced below:

Clause 17

Detailed progress claim in accordance with the attached format are to be in our hands by the 21st of each month (with diary entries attached – see item 10) for the calendar month preceding. **We will endeavour** (this is not to be considered a guarantee) **to pay these claim within 5 days after payment to Winstone Architectural Ltd of monies claimed on behalf of the Sub-Contractor**. If your claim is not received by the 21st of the month, it may be included in the following month's claim. (emphasis added)

Clause 18

Payment will be made in accordance with the contract document. Before any progress payment is made the necessary public liability insurance cover note 6 shall be delivered to the office of Angus Construction Ltd. **Payments will be made within five working days of receipt of the client's cheque**. (emphasis added)

(d) In the instant case, the two provisions are cl. 20 and para. 5 which are reproduced below:

Clause 20

Payment shall be made to the Sub-Contractor in accordance with the quantity of work certified by the SO or the client's representative to the Sub-Contract works subject to deductions as provided, by this agreement, **within the period for payment as specified in the schedule**. (emphasis added)

Para. 5

Clause 20 - Payment shall be made to the Sub-Contractor after agreement of the Sub-Contractor's valuation **within 14 days upon receiving payment from the client**. (emphasis added)

(e) A comparison of the relevant provisions in the two cases discloses the following:

(i) In clause 20, the words used are "payment shall be made ... within the period for payment as specified in the schedule". There is the use of the word "shall" which would appear to impose upon the plaintiffs a contractual duty to pay within the period as specified in the schedule. The question thus arises:

What is meant by the words "within the period as specified in the schedule"? The answer can be found in para. 5 of the schedule in the following words "within 14 days upon receiving payment from the client". It would appear from these two provisions that there is a contractual duty on the part of the defendants to pay the plaintiffs within 14 days after the defendants have received payment from the client and not before that event had occurred.

(ii) What happens if the client does not pay? Does it mean the plaintiffs' claim must necessarily fail because there is no substratum, ie, no payment by the client, although the plaintiffs have completed the work and the valuation has been approved by the defendants? In my opinion it would appear from the two provisions that the answer to the second question is in the negative unless the plaintiffs can demonstrate to the court that the client is deliberately delaying making payment to the defendants without a reasonable or just excuse or has gone into receivership and so is unable to pay the defendants, in which event the following observations of Master Towle in the *Smith & Smith Glass Ltd case* (*supra*) at p. 479, at line 10 onwards to line 14 may be relevant:

> ... the only question relating to the arguability of the pay when paid defence is whether there was included in the contractual clauses ... an acceptance by the plaintiff that it was only to be paid provided the defendant itself received the money from Angus.

Further on the same page, at line 32 onwards to line 39, at p. 480 he has this to say:

> It seems however that if the parties wish to regulate their liability to pay the party with whom they are in sub-contract and to prescribe that their liability arises only in so far as they themselves receive payment from the owner or head contractor they must do so by express agreement. It could not be seriously suggested that there could be implied into any contract made between a contractor and subcontractor that the latter was only to be paid once the head contractor had been paid, for this would involve an acceptance by the sub-contractor of the financial viability of the entire project.
>
> Counsel have referred me to a case reported in the High Court of the *Republic of Singapore, Brightside Mechanical & Electrical Services Group v. Hyundai Engineering & Construction Ltd* [1998] 41 BLR 110,

where the point was considered in relation to a clause and a sub-contract which read:

> Within 5 days of the receipt by the contractor of the sum included in any certificate of the architect the contractor shall notify and pay to the sub-contractor the total value certified therein ... less:
>
> (iii) Any sum to which the contractor may be entitled in respect of delay and completion of the sub-contract works or any section thereof.

The court in dealing with the matter and dismissing an appeal held provisionally (1) that the clause quoted contemplated the actual receipt by the main contractor of the sum included in the certificate so that the defendants were not obliged to pay the sum certified by them which was therefore not indisputably due and payable to the plaintiffs and (2) that the point of law raised by the defendants was not "bad" and was highly arguable and should be referred to arbitration. It was stated in a commentary on the report that clauses such as this of pay when paid in kind were quite prevalent in this United Kingdom, and that as a matter of commercial policy such clauses might be justified on the grounds that they apportion the risk of non-payment by the employer between those who have earned the right to be paid. In other words it was suggested that it was fair that the contractor should not be the guarantor of the employer by being liable to pay even though he himself had not been paid.

> The judgment shows that the matter was not dealt with on a final basis but that it reached the conclusion that in the Singapore jurisdiction the plaintiff was not entitled to summary judgment without the matter being considered fully. In that particular case also the employer had set off a claim for liquidated damages for late completion of the work by the contractor and no such circumstances need be considered here. Reference was also made in the judgment to Hong Kong decisions including *Hong Kong Teakwood Works Ltd v. Shui On Construction Co Ltd* [1984] Hong Kong LR 235 and *Schindler Lifts (Hong Kong) Ltd v. Shui On Construction Co Ltd* [1984] 29 BLR 95. Those cases may be taken as giving some support to the claim advanced by the defendant as to the meaning of pay when paid clauses. In each of the cases cited from these jurisdictions applications for summary judgment were under consideration when the court came to the view that there was an arguable defence. It was submitted on behalf of the plaintiffs that they could hardly be held out as being authoritative statements of the law but merely established that it was sufficiently arguable in those jurisdictions to prevent the plaintiffs from obtaining summary judgment.

(f) The learned judge than went on to deal with a number of American cases, *viz Pace Construction Corporation v. OBS Co Inc Fla App. 531 So 2d 737* [1988], *Peacock Construction Co. Inc. v. Modern Air Conditioning Inc Fla App. 353 So 2d 840* [1977], *AA Conte Inc v. Campbell-Lowrie Lautermilch Corporation 477 NE 2d 30* [1985] and *Southern Plates Masonmy Inc v. JA Jones Construction Company Fla App 507 So 2d 198* [1987] before concluding as follows: at p. 481, line 41 onwards to line 47 and on p. 482, line onwards to line 1:

> For myself I believe that unless the condition precedent is spelled out in clear and precise terms and accepted by both parties, then clauses such as the two particular ones identified in this proceeding do no more than identify the time at which certain things are required to be done, and should not be extended into the "if" category to prevent a subcontractor who has done the work from being paid merely because the party with whom he contracts has not been paid by someone higher up the chain.

... In this particular instance I do not find it reasonably arguable that the two particular clauses governing the relationship between the present plaintiff and the defendant are of the category of being "if" clauses rather than "when" clauses. As such, therefore, they do not afford the basis for a reasonably arguable defence that the defendant was not obliged to pay until such time as it in turn was paid by the head contractor.

The court would like to emphasise here that the facts in the *Smith & Smith Glass Ltd* case *(supra)* are distinguishale because in that case the owner of the project had gone into statutory management and the head contractor had gone into receivership, whereas in the instant case the client is only undergoing some financial problems. Furthermore, the learned judge in that the case has chosen ro rely on decided American cases as authorities instead of English cases.

(g) In the *Brightside Mechanical & Electrical Services Group Ltd* case (*supra*), the plaintiffs were the mechanical sub-contractor for the Marina Centre in Singapore.

The defendants were the main contractor. Owing to delays in the completion of the project the owners refused to pay the defendants and held the money due on the premises that it was to be used for set off against liquidated damages to be paid for the delay. The defendants in turn refused to pay the sum of S$924,711 certified as payable to the plaintiffs. The plaintiffs sued the defendants for this sum and applied for summary judgment. The defendants applied for a stay of proceedings pending arbitration which application was allowed by the Assistant Registrar. The plaintiffs appealed.

(h) In dismissing the plaintiffs' appeal, his Lordship Thean J held that upon a provisional contruction of cl. 11(b) of the sub-contract, the clause contemplated the actual receipt by the main contractor of the sum included in the certificate and that until the defendants received from the owner the sum claimed by the plaintiffs they were not obliged to pay it to the plaintiffs. Upon applying the general principles pertaining to an O.. 14 application he ruled that the plaintiffs were not clearly entitled to judgment in view of the point of law raised by the defendant, *viz*, the construction of cl. 11(b). He consequently held that there was a dispute which had to be referred to arbitration.

(i) clause 11(b) of the sub-contract provided as follows:

> 11(b) Within five days of the receipt by the contractor of the sum included in any certificate of the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of the sub-contract works and in respect of any authorised variations thereof and in respect of any amounts ascertained under cl. 8(c) hereof less:
>
> (i) retention money, that is to say the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract and at the rate specified in Part IV of the appendix to this sub-contract;
>
> (ii) number not used;
>
> (iii) any sum to which the contractor may be entitled in respect of delay in the completion of the sub-contract works or any section thereof; and
>
> (iv) the amounts previously paid.

It would appear from a comparison of this clause and para. 5 in the instant case that the two are very similar because both use the words "shall" follow by "within five days of receipt by the main contractor of the amount certified by the architect." It was held that, *prima facie*, under cl. 11(b), payment shall be made by the main contractor to the sub-contractor within five days of the receipt by the architect and since there was no such receipt, the plaintiffs claim for summary judgment failed; and

(j) In my view the facts in the above decision are similar to the facts in the instant case. In that case there was a dispute concerning liquidated damages for late completion of the project which had to be referred for arbitration before the owner of the project would make any payment. In the instant case although the Statement of Final Account was signed by both the plaintiffs and defendants there is no certificate from the SO or the client's representative to confirm the amount claimed by the plaintiff in the Statement of Final Account. The letter dated 14 July 2000 by JOPP Builders Sdn Bhd to the defendants and the reply by the defendants to

JOPP Builders Sdn Bhd dated 24 July 2000 (collectively exhibited as exh. "YSC2") do not indicate that the delay in payment by the client to the defendants of the plaintiffs' claim was not due to the plaintiffs' alleged 105 days delay in completing the said works under the sub-contract or to the costs of remedial works as alleged by the defendants. The letter only indicates that the delay in payment of the defendants' claim by the client was because the Lions Group had been significantly affected by the regional crisis in the past 2 1/2 years resulting in the Group having to take necessary measures to deal with the financial problems arising from currency depreciations, depressed market conditions, poor demands and other funding pressures in the form of its Group-Wide Restructuring Scheme (GURS) which involved debt restructuring and reorganising the Group's operations making it more streamlined and focused.